

# **The Special Education Due Process Hearing**



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## **A Handbook for Parents and School Administrators**

Virginia Department of Education  
Division of Special Education and Student Services  
Office of Dispute Resolution and Administrative Services  
P. O. Box 2120  
Richmond, Virginia 23218-2120  
Phone: (804) 225-2013 Fax: (804) 786-8520  
VDOE Toll Free: (800) 422-1098 (also for TDD)  
Local TDD: (804) 371-0655  
<http://www.pen.k12.va.us/VDOE/dueproc/>



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## **Introduction**

The information in this booklet is designed to help individuals understand the steps for requesting and managing a due process hearing. This information is not intended as legal advice or as an interpretation of the laws and regulations governing special education in Virginia. The information will, however, help in understanding the implementation of these laws and regulations.

Additional information may be obtained from your local school division, Parent Resource Center, the Virginia Department of Education (VDOE), the VDOE website at <http://www.pen.k12.va.us/VDOE/dueproc/>, or from your attorney.

## **I. The Due Process Hearing**

The due process hearing is an impartial procedure used to resolve disagreements over issues related to special education services that arise between a parent<sup>1</sup> and a school division (referred to as the local educational agency, LEA). The right of the parent or LEA to request a due process hearing is guaranteed by federal and state laws governing the education of children with disabilities.<sup>2</sup> The cost of a due process hearing is shared by the LEA and the state educational agency (SEA) which is the Virginia Department of Education. The proceedings are at no cost to the parent, unless he/she chooses to hire an attorney.<sup>3</sup>

A parent may request a due process hearing to resolve disagreements regarding such matters as, but not limited to:

- the evaluation or re-evaluation of a child,
- the eligibility of a child to receive special education services,
- the educational placement of a child, or
- the provision of a free appropriate public education (FAPE).

An LEA may also request a due process hearing to resolve disagreements regarding such matters as, but not limited to:

- a parent's request for the LEA to pay for an independent educational evaluation (IEE) of a child, or
- a parent's refusal to consent to an action for which parental consent is required.

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<sup>1</sup> In this document, "parent" as defined in the Regulations Governing Special Education programs for Children with Disabilities in Virginia, 2002, (the Virginia Regulations) means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed pursuant to 8 VAC 20-80-80. The term does not include the state if the child is a ward of the state. The term means either parent unless the LEA has been provided with the evidence that there is a legally binding instrument or a state law or court order to the contrary. The term also includes persons acting in the place of a parent such as a grandparent or stepparent with whom the child lives. A child 18 years or older may assert any rights under these regulations in his own name.

<sup>2</sup> The federal law governing the education of children with disabilities is the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C §§ 1400, et seq. The relevant state law is Code of Virginia §§ 22.1 - 213, et seq. and the Virginia Regulations.

<sup>3</sup> Under the federal and state regulations governing special education, the state department of education (SEA) is a public agency just as is the LEA. Therefore, a parent may request a due process hearing against the VDOE, or may include VDOE as a party in a due process hearing request.

## **Expedited Due Process Hearing**

The parent of a child with a disability may request an expedited due process hearing if the parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement relative to disciplinary actions taken by the LEA.

Additionally, a local educational agency may request an expedited due process hearing under the Virginia Department of Education's due process hearing procedures to effect a change in placement of a student with a disability for not more than 45 calendar days if the local educational agency believes that the student's behavior is likely to result in injury to self or others. This procedure may be repeated as necessary.

## **Initiating the Due Process Hearing**

A request for a due process hearing must be made in writing to the LEA.<sup>4</sup> The request may be addressed to the LEA's superintendent, special education director, or the division's designee. The request should identify the student, the circumstances that have brought about the request, and the parent's telephone number and address to which the LEA may respond.

A model form to be used by the parent or parents to give notice when filing a request for due process hearing may be found in the VDOE website at <http://www.pen.k12.va.us/VDOE/Instruction/dueprocess.pdf> or by contacting VDOE at (804) 225-2013. The form contains an area for the parent to provide: the name of the child; the address of the residence of the child; the name of the school the child is attending; a description of the nature of the problem, including facts relating to the problem; and a proposed resolution of the problem to the extent known and available to the parent or parents at the time of the notice.

When the LEA receives a request for a due process hearing, it must appoint an impartial hearing officer to manage the case within five (5) business days [three (3) business days for an expedited due process hearing]. The hearing officer must decide the case within 45 calendar days of the hearing's request [twenty (20) business days for an expedited due process hearing]. The hearing officer is not employed by the LEA, but is appointed by the Virginia Supreme Court.

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<sup>4</sup> Hearing officers, parents, and LEAs should consult the Virginia Regulations and the Code of Virginia when determining the time within which the request for a hearing can be made, and when determining the time for appeals.

When a request is made to initiate a due process hearing, the LEA contacts the Virginia Supreme Court. The Court identifies an approved hearing officer from a rotating regional list. The LEA then contacts the hearing officer to request and confirm acceptance. The hearing officer is not chosen by the LEA, and must be impartial to both parties.

If requested, the VDOE will share the qualifications of the hearing officer with the parent or parents and the local educational agency. Either party has two business days to submit to the Virginia Supreme Court an objection to the appointment of the hearing officer on the basis of conflict of interest. Any party may request the disqualification of a hearing officer by filing an affidavit with the Executive Secretary of the Supreme Court of Virginia prior to the taking of evidence at the hearing.

If a hearing officer recuses himself/herself or is otherwise disqualified, the local educational agency shall ensure that another hearing officer is promptly appointed.

## **Representation by Attorney**

Neither the parent nor the LEA is required to hire an attorney to represent them at a due process hearing. The Virginia Regulations require the LEA to provide parents with information regarding any free or low cost legal services in their area when the hearing process is initiated or at any time the parent makes a request for such information.

The hearing officer may not, as part of his/her decision in the case, award attorney's fees. However, if the parent is the prevailing party at the hearing, his/her attorney may petition a court and request an award of reasonable attorney's fees in accordance with applicable regulations.

## **II. Alternatives to Due Process**

### **Settlement**

To protect the cooperative relationship between them, a parent and an LEA may attempt to resolve disagreements among themselves. Together the parent and the LEA may reach an agreement, thus eliminating the need for a due process hearing or any other resolution action.

### **Mediation**

Settlement of the dispute may be reached through mediation. Mediation is a voluntary process that gives parties the opportunity to meet with an independent third-party facilitator to assist them in resolving disputes. Mediation is conducted by an individual from a list of approved mediators. The mediator is trained in special education, and cannot have been previously involved in the particular case. The mediator uses a variety of problem-solving methods including clarifying issues, identifying interests, determining areas of agreement, and helping parties to self-determine an outcome. The mediator provides a problem-solving structure and process and assures that everyone will be listened to with respect. The mediator does not make decisions for the parties.

The school division must inform parents of the availability of mediation whenever a due process hearing is requested. When mediation is used, the hearing officer continues to have administrative responsibility for the hearing. The hearing must still be completed within the 45-day time frame, [twenty (20) business days for an expedited due process hearing] as provided by regulations, unless otherwise agreed by the parties and in the child's best interest.

For information regarding mediation, please see VDOE's website at <http://www.pen.k12.va.us/VDOE/Instruction/ssems.html> or contact VDOE at (804) 786-0711.

### **Complaint Process**

In addition to the due process and mediation system, the VDOE also maintains a complaint system. Parents or complainants may seek resolution of an issue by filing a complaint with the Office of Dispute Resolution and Administrative Services in the Division of Special Education and Student Services at the Virginia Department of Education.



Please note the following information:

- A complaint must be in writing.
- The complaint must be signed by the organization or individual filing the complaint,
- The complaint must contain a statement alleging that a school division has violated IDEA or Virginia's special education regulations.
- Complaints are sent to the Virginia Department of Education in Richmond; however, the school division and the complainant are encouraged to resolve the complaint between themselves during the first ten days before an investigation is initiated.
- A determination must be made within 60 calendar days after the complaint is received by the Office of Dispute Resolution and Administrative Services. A decision on a complaint is issued in a Letter of Findings.

### **III. The Impartial Hearing Officer**

#### **Appointment of the Hearing Officer**

Impartial hearing officers are appointed by the Virginia Supreme Court from a list maintained by the Office of the Executive Secretary of the Supreme Court. The hearing officer is appointed according to the Hearing Officer System Rules of Administration developed by the Virginia Supreme Court. Although it is the LEA's responsibility to arrange for the services of the hearing officer, the hearing officer is not an employee of the LEA or the SEA.

#### **Qualifications of the Hearing Officer**

All persons on the hearing officers' list are attorneys who have at least five (5) years of active legal experience as an attorney and who have received special training in conducting administrative hearings. Hearing officers assigned to cases related to special education receive training in special education laws, regulations, procedures, and programs. Each year, hearing officers attend training sessions and they are evaluated by the Virginia Supreme Court in conjunction with the Office of Dispute Resolution and Administrative Services with the Virginia Department of Education, and the local school divisions.<sup>5</sup>

#### **Impartiality of the Hearing Officer**

In order to ensure impartiality, the hearing officer may not be a person employed by VDOE or the LEA that is involved with the care or education of the child in the case, and may not have any other personal or professional interest which would conflict with his or her objectivity in the hearing. A hearing officer may not represent schools or parents in any matter involving special education or disability rights, nor be an employee of any parent rights or disability rights agency or organization. A hearing officer may decline an appointment or ask to be excused if a conflict is known.

In addition, a hearing officer may not communicate with either party about substantive matters in the case without the knowledge and/or participation of the other party. This prohibition does not include communication regarding procedural matters, such as questions about how or when the hearing is being conducted. If a

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<sup>5</sup> Parties may consult the Supreme Court of Virginia for more information.

parent or LEA is uncertain about what matters may or may not be discussed, they may ask the hearing officer what is appropriate.

## **Responsibilities of the Hearing Officer**

The responsibilities of the hearing officer include, but are not limited to, the following:

- Maintaining the integrity and dignity of the hearing process.
- Setting a time, date, and location for the hearing which are convenient for the parents and the LEA. (This must be accomplished within five business days of the appointment as hearing officer and includes the requirement of sending a notice to the parties of the time, date, and location of the hearing as well as the anticipated date of decision.)
- Ensuring the informed participation of both parties.
- Reaching a decision, based on special education law and regulations, within 45 calendar days of the hearing request [twenty (20) business days for an expedited due process hearing].
- Granting an extension at the request of either party only when it serves the best interests of the child. An extension may not be granted for the convenience of either of the parties or their attorneys.
- Providing all parties notice in writing when an extension is granted. (The notice must include the revised schedule for the hearing and the anticipated date of decision. If mediation or an independent educational evaluation (IEE) is ordered, the notice must also include the time period granted for these activities.)
- Ensuring that when notice is provided, the parent and school division are copied, even when they are represented by counsel, unless otherwise agreed in advance.

## **IV. Before the Due Process Hearing**

### **The Pre-Hearing Conference**

The pre-hearing conference is an initial step in managing the hearing. It is required for every hearing; and if it is not held, the hearing officer must document why a pre-hearing conference was not held. The conference may be held over the telephone or in person. It is attended by the parties and any attorneys involved.

The hearing officer may use a pre-hearing conference to accomplish several things:

- to determine the appropriate time, date, and location for the actual hearing;
- to clarify or narrow the issues involved;
- to clarify the parties' positions regarding each issue;
- to eliminate non-hearable issues; and
- to explore the possibility of settlements.

Even though the parties may have discussed settlement or engaged in mediation prior to the pre-hearing conference, the hearing officer may offer ideas for settlement of the case or suggest areas of compromise regarding disputed issues.

### **The Pre-Hearing Report**

After the pre-hearing conference, the hearing officer prepares a pre-hearing report. The pre-hearing report is a written summary of the conference, usually, but not necessarily, on a form supplied by the Department of Education. The hearing officer sends a copy of the report to the LEA, the parents and the Virginia Department of Education. This report serves as documentation that the hearing officer has set the hearing date, location, and time within the required five (5) business days [two (2) business days for an expedited due process hearing].

## **V. During the Due Process Hearing**

### **The “Stay-Put” Provision**

During a due process hearing or judicial proceeding, the “stay put” provision of the IDEA is in effect. The child, therefore, remains in his/her current educational placement (unless the LEA and the parent agree otherwise) until the hearing or judicial proceedings are completed.

If a parent requests a hearing to challenge the manifestation determination or the interim alternative educational setting when disciplinary action is taken regarding a child who carried or possessed drugs or a weapon to school or at a school function, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the 45-day time period provided for in the regulations, whichever occurs first, unless the parent and the LEA agree otherwise.

### **The Proceedings**

A due process hearing is an administrative proceeding, however, it resembles a trial in some ways. Both parties may present evidence and call witnesses; a record is made of the proceedings, usually by a court reporter; and the decision is made by an impartial person, the hearing officer. However, the due process hearing is less formal than some courtroom proceedings.

The hearing typically takes place at a school site; however, any mutually agreed upon location is acceptable. Each of the parties may bring witnesses to the hearing. To do so, they must submit the witnesses’ names to the hearing officer no later than five (5) calendar days before the date of the hearing [no later than two (2) business days for an expedited hearing].

Both parties may subpoena witnesses and documents. A party may request the hearing officer to issue a subpoena, but usually has to provide identifying information for the subpoena and must cover the related costs. The parents decide whether the hearing is open or closed to the public and whether or not their child will testify or be present at the hearing.

The length of a due process hearing depends upon the issues involved, the availability of the parties to attend the hearing on a given day, how well-organized each of the parties is in presenting evidence and testimony, and how the hearing officer manages the hearing.

To ensure fairness to each of the parties, and to further protect the impartiality of the hearing officer, all proceedings are “on the record,” transcribed by a court reporter and/or recorded on audio tape. The recording expenses are covered by the local school division. The Virginia Department of Education provides partial reimbursement for the costs. Following the hearing, the parties may request a copy of a written or electronic transcript of the proceedings.

## **VI. The Decision and Appeal Rights**

### **The Due Process Decision**

The hearing officer's determination on the issues in the case is formalized in a document referred to as a decision. The hearing officer sends the written decision to the parties and sends a copy to the Virginia Department of Education, as required by the regulations. The decision usually includes identifying information about the parties, a summary of the proceedings, the issues in the case, legal authority, the final determination by the hearing officer, and appeal rights. This determination explains who prevailed on what issue, and what the school division, the parent, and the student are expected to do to carry out the orders of the hearing officer.

### **Right to Bring Civil Action in Court**

A decision by the hearing officer shall be final and binding unless the decision is appealed by a party. When the parent or the LEA objects to the hearing officer's decision, any party aggrieved has the right to appeal the decision by filing a civil action with an appropriate court. The civil action may be filed in either a state circuit court within one year of the issuance of the decision, or in a federal district court. When a civil action is brought, parties are advised to consult the regulations of the Board of Education concerning special education due process hearings, as well as the local rules of the court in which the civil action is filed.

## **VII. After the Due Process Hearing**

### **The Implementation Plan**

Within 45 calendar days of the hearing officer's decision or the withdrawal of a hearing request, the LEA must develop and submit an implementation plan to the Virginia Department of Education. The purpose of this requirement is to ensure that the hearing officer's decision is implemented. Submission of this plan is the responsibility of the LEA. The plan is based upon the hearing officer's decision, or upon the parties' agreement if a settlement is reached prior to the decision. The plan must specify when the decision or agreement will be put into effect. A revised IEP must be included in the implementation plan if the decision or agreement affects the child's educational program.

### **Failure to Follow the Implementation Plan**

Failure of either of the parties to comply with the implementation plan should be reported to the Virginia Department of Education, Office of Dispute Resolution and Administrative Services, for investigation and/or appropriate action through the complaint system. When a complaint is received, the Virginia Department of Education grants the parent and LEA ten administrative days in which to resolve the dispute themselves. The Virginia Department of Education has 60 calendar days from the date the complaint is received to make a determination of compliance or noncompliance and to notify the parties of its decision.

### **Evaluating the Hearing**

The Office of Dispute Resolution and Administrative Services sends a questionnaire to both the parent and the special education administrator following the hearing officer's decision. Responses from the evaluation assist VDOE in evaluating the hearing officer's management of the hearing, the hearing process itself, and in identifying issues for future hearing officers' training.



## **Appendix A**

### **Due Process Hearing Time Line**

Within five (5) business days

- of receiving a request for a due process hearing, the LEA must appoint an impartial hearing officer;
- of being appointed as a hearing officer, the hearing officer must notify all parties of the date, time, and location of the hearing and the anticipated date of decision.

At least five (5) business days before the hearing date

- the parties submit evidence and a list of witnesses to the hearing officer.

Within forty-five (45) *calendar* days of the request for the hearing, the hearing officer must issue a final written decision, unless the hearing officer has granted and properly documented an extension requested by one of the parties in the best interest of the child.

### **Expedited Due Process Hearing Time Line**

Within three (3) business days

- of receiving a request for an expedited due process hearing, the LEA must appoint an impartial hearing officer.

Within two (2) business days before the expedited due process hearing date

- the parties submit evidence and a list of witnesses to the hearing officer.

Within twenty (20) *business* days of the request for the expedited due process hearing, the hearing officer must issue a final written decision.

## **Appendix B**

### **Federal and State Law Resources**

- Individuals with Disabilities Education Act, (IDEA) as amended, 1997 (20 U.S.C. §1400 *et. seq.*)
- The 1999 federal IDEA Implementing Regulations (34 C.F.R. Part 300)
- Section 504 of the Rehabilitation Act of 1973, as amended
- Regulations Governing Special Education Programs for Children with Disabilities in Virginia (revised 2001), available on the internet at this website:  
<http://www.pen.k12.va.us/VDOE/Instruction/Sped/varegs.pdf>
- “Complaint Procedures for Special Education,” available from the Office of Dispute Resolution and Administrative Services, and available on the internet at this website:  
[http://www.pen.k12.va.us/VDOE/Instruction/com\\_pamp.pdf](http://www.pen.k12.va.us/VDOE/Instruction/com_pamp.pdf)
- “The Special Education Due Process Hearing - A Handbook for Parents and School Administrators,” available from the Office of Dispute Resolution and Administrative Services, and available on the internet at this website:  
[http://www.pen.k12.va.us/VDOE/Instruction/due\\_pamp.pdf](http://www.pen.k12.va.us/VDOE/Instruction/due_pamp.pdf)
- Videos available for loan from the Department of Education
- Individuals with Disabilities Education Law Reporter (IDELR), available at law school libraries, some law offices, and the Department of Education (reference use only)
- Mediation (Statewide Special Education Mediation Services): Contact the Virginia Department of Education, or see the information available on the internet at  
<http://www.pen.k12.va.us/VDOE/Instruction/ssems.html>
- Hearing Officer System Rules of Administration, Supreme Court of Virginia
- Due Process Hearing request form, available on the internet at this website:  
<http://www.pen.k12.va.us/VDOE/Instruction/dueprocess.pdf>
- Special Education Complaint form, available on the internet at this website:  
<http://www.pen.k12.va.us/VDOE/Instruction/PCF.pdf>

## **Appendix C**

### **Know Your SPED Vocabulary/Acronyms**

504	-	A section of the Rehabilitation Act of 1973
ADD	-	Attention Deficit Disorder
ADHD	-	Attention Deficit Hyperactivity Disorder
BIP	-	Behavioral Intervention Plan
DD	-	Developmental Delay
DOE	-	Department of Education, also referred to as VDOE
ED	-	Emotionally Disturbed
EHA	-	Education of the Handicapped Act
ESY	-	Extended School Year
FAPE	-	Free Appropriate Public Education
FBA	-	Functional Behavioral Assessment
FERPA	-	Family Educational Rights and Privacy Act
HI	-	Hearing Impairment
IAES	-	Interim Alternative Educational Setting
IDEA	-	Individuals with Disabilities Education Act
IDELR	-	Individuals with Disabilities Education Law Reporter
IEE	-	Independent Educational Evaluation
IEP	-	Individualized Education Program
IHO	-	Impartial Hearing Officer
LD	-	Learning Disability
LEA	-	Local Educational Agency
LPT	-	Literacy Passport Test
LRE	-	Least Restrictive Environment
MDR	-	Manifestation Determination Review
MR	-	Mental Retardation
OHI	-	Other Health Impaired
OI	-	Orthopedic Impairment
OT	-	Occupational Therapy
PT	-	Physical Therapy
SEA	-	State Educational Agency
SED	-	Serious Emotional Disturbance
SLD	-	Specific Learning Disability
SP/L	-	Speech/Language
SPD	-	Severe and Profound Disability
SPED	-	Special Education
TBI	-	Traumatic Brain Injury
USDOE	-	United States Department of Education
VDOE	-	Virginia Department of Education
VI	-	Visual Impairment